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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	)	CS Docket No. 96-46

REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

I. INTRODUCTION

USTA respectfully files reply comments in the above-captioned rulemaking regarding open video systems. On many issues, the commenters in this proceeding divide into two distinct groups: those that urge the Commission to adopt flexible, streamlined regulations implementing the open video systems provisions of the Telecommunications Act of 1996 (the "Telecom Act")[1/] and those that urge the Commission to impose onerous regulations on open video system operators extending far beyond the specific obligations imposed on them under the Telecom Act.[2/] In addition, other commenters focus on the issues raised by the imposition

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1/ See, e.g., Comments of Viacom, Inc.; MFS Communications Co., Inc.; Alliance for Public Technology (APT); and Access 2000.

2/ See, e.g., Comments of the National Cable Television (NCTA), Cablevision Systems Corp. and the California Cable Television Association (Cablevision/CCTA), Continental Cablevision, Inc.; and Tele-Communications, Inc. (TCI).

of certain cable rules, such as public, educational, and governmental ("PEG") access and must-carry.[3/]

USTA, its member local exchange carriers ("LECs"), many non-profit interests, and prospective programmers look to open video systems to emerge as a viable video programming delivery alternative. USTA opposes the comments of many cable operators, whose objective in this proceeding is not surprising: they seek to replicate the failed video dialtone experience for open video systems and the other competitive options.[4/]

The Commission should reject cable's transparent arguments and heed the counsel of parties that want open video systems to succeed. If it were to mistakenly adopt the cable industry's proposals, the Commission would effectively eliminate open video systems as a viable video entry alternative. In doing so it would contravene the statute's explicit intent to make open video systems a viable way to compete. Cable operators want to follow the video dialtone path, hoping to duplicate their success in thwarting that limited form of multichannel video programming competition.[5/] The Commission expended considerable resources on the

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[3/] See, e.g., Comments of the Association of America's Public Television Stations; Greater Metro Cable Consortium; Alliance for Community Media, *et al.*; Political Subdivisions of the State of Minnesota; City of Indianapolis Cable Communications Agency; Texas Cities; City of Seattle Department of Administrative Services; and City and County of Denver.

[4/] Other parties recognize that there must be incentives for LECs to choose the open video system option, but then propose additional burdens that would render open video systems a nullity. See Comments of Alliance for Community Media at 3.

[5/] See, e.g., Comments of NCTA at 17-25; Cablevision/CCTA at 25; Continental Cablevision at 7, 11. For example, NCTA proposes a ten-point "checklist" that recreates many of the most burdensome features of the video dialtone administrative processes. Comments of NCTA at 3.

failed video dialtone model, but was always severely constrained by the since-repealed statutory framework. The open video system framework is specifically intended to correct these shortcomings.

Many of the regulatory burdens sought by the cable industry and others such as MCI and the Alliance for Community Media et al. would effectively violate the intent of the Telecom Act, which precludes title II common carrier regulation of open video systems. The legislative history specifically provides:

> The conferees do not intend that the Commission impose title II-like regulation under the authority of this section.
>
> Rules and regulations adopted by the Commission pursuant to its jurisdiction under title II should not be merged with or added to the rules and regulations governing open video systems, which will be subject to new Section 653, not title II.[6/]

The Commission clearly acknowledged this in the Notice.[7/] Accordingly, it should adopt the least burdensome open video system regulations consistent with the statute.[8/]

II. THE COMMENTS SUPPORT THE WISDOM OF STREAMLINED REGULATION OF OPEN VIDEO SYSTEMS

As USTA demonstrated in its initial comments, only streamlined regulation meets the legislative intent that open video systems create an attractive option for video entry.

6/ Conference Report at 178-79.

7/ Notice at para. 5.

8/ USTA also opposes the "petition for reconsideration" filed by NCTA seeking that the Commission terminate existing video dialtone authorizations. Comments of NCTA at 39-41. The continued operation of existing video dialtone systems should be left to the discretion of the operators.

In this regard, USTA endorses the open video system rules proposed by several LECs filing jointly in the initial round.[9/]

A. Limited Regulation to Address Discrimination and Capacity Issues Is Most Consistent With the Statute

The record amply supports the Commission's proposed approach, which is to codify the statutory prohibition barring open video system operators from discriminating against unaffiliated programmers with regard to carriage on their systems. Opponents of open video systems raise a welter of unsupported charges of potential discrimination. They urge the Commission to adopt rules to address such hypothetical situations prospectively, but offer no suggestions as to how to write rules to address all eventualities.[10/] Such a set of rules is impossible to formulate.

The dispute resolution mechanism is the best way to deal with claims of unreasonable discrimination. The 180-day dispute resolution process mandated by the Act. and backed up with the potential for damages or required carriage, will be an effective and nonburdensome check on any risk of discrimination.[11/]

The Commission should not require disclosure of contracts between open video system operators and programmers. Indeed, it is instructive to note that the Commission has

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[9/] See Appendix to Joint Comments of Bell Atlantic, BellSouth, GTE, Lincoln Telephone, Pacific Bell, and SBC Communications (LEC Joint Comments).

[10/] Comments of Cablevision/CCTA at pp. 7-10,; Time Warner Cable at 19-24; and TCI at 7-14.

[11/] In this regard the open video system complaint process will have more teeth and arguably will be a more effective deterrent to discriminatory conduct than the Commission's program access rules, since complainants that prevail under those rules currently are not entitled to recover damages as a remedy. See 47 CFR § 76.1003.

declined to require disclosure of leased access cable-programmer contracts, a decision heartily supported by cable operators such as Time Warner that seek such disclosure in the open video systems context.[12/]

The Commission should adopt its tentative conclusion that open video system operators be permitted to administer the allocation of channel capacity and channel sharing arrangements. A well-designed dispute resolution mechanism will be sufficient to protect against the risk of discrimination.[13/] Proposals for detailed rules governing allocation of channel capacity and enrollment periods cannot foresee, and therefore would preclude, possible innovative network configurations and service arrangements. Such proposals attempt solely to make open video systems a burdensome and unattractive video entry alternative.

B. Regulation of Open Video Systems Should Be Limited to the Federal Level

The Commission should reject proposals that would give states or other jurisdictions a role overseeing open video systems.[14/] Such a role is not contemplated in the statute. Oversight by multiple jurisdictions would place so many burdens on open video systems that no provider would ever select them. Because open video systems are an entry

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12/ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access, MM Docket 92-266, CS Docket 96-60, Order on Reconsideration, FCC 96-122 (rel. Mar. 29, 1996) at paras. 58-60. There, for example, Time Warner opposed disclosure of such contracts, while in this proceeding, it advocates disclosure for others.

13/ See, e.g., Comments of APT at 7; Viacom at 8; Access 2000 at 6-7; LEC Joint Comments at 32-33.

14/ See, e.g., Comments of New Jersey Division of Ratepayer Advocate at 6; City and County of Denver at 8; Texas Cities at 10; City of Seattle Department of Administrative Services at 1.

option, local oversight would rob potential video entrants of the primary incentive for operating an open video system -- a significant reduction in regulation.

Likewise, the Commission should reject the efforts of the local municipalities to convert their control over public rights-of-way and the Telecom Act's PEG access requirement into a de facto franchise process. While the Telecom Act gives local governments the right to assess charges on open video system operators in lieu of franchise fees, it explicitly exempts open video system providers from franchise regulation.[15/] It certainly does not allow municipalities to require that providers obtain additional right-of-way authority as a part of the statutory certification process. Consistent with the statutory scheme, open video system operators are required to provide PEG channels in a manner "no greater or lesser" than the obligations of cable operators. However, nothing in the Telecom Act requires open video system providers to duplicate existing PEG facilities or negotiate the conditions of PEG access with local authorities and incumbent cable operators as a condition for certification. Rather, open video system providers should be given the flexibility to create and deploy new and innovative approaches to providing access to PEG programming to local communities.

C. Market Forces Will Ensure Reasonable Open Video System Rates

MCI argues that since open video system providers will not face competitive markets at a "wholesale level," there is a need for Commission oversight of open video system charges to prevent discriminatory conduct. Similarly, NCTA contends that open video system operators will essentially be controlling a "bottleneck facility," justifying regulation of open

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15/ Telecom Act, Section 653(c)(1).

video system rates in a manner in which common carrier services are regulated.[16/] These arguments should be rejected as inapposite to both the letter and spirit of Section 653.

First, the "bottleneck" argument ignores the fact that an open video system operator's entry into the market will relieve the monopoly wireline cable provider from any and all rate regulation and that the new entrant will be competing against a variety of alternative video delivery systems, including DBS and MMDS. Therefore, it makes no sense to subject open video system operations to the type of overbearing rate regulation typically reserved for monopoly service providers.

Second, rates charged to open video system programmers will be effectively constrained by the general level of retail rates charged to subscribers within the local cable market and the desire to make efficient use of capacity in open video systems. All programmers, regardless of their business relationship with the open video system operator (i.e., affiliation), must be able to afford the cost of transport on the system if they are to offer competitive rates for their retail services. Thus, open video system operators will face adequate market place incentives to price access to their systems at reasonable rates. Doing so will ensure that the open video system as a whole is a viable competitive alternative to cable. In addition, open video system operators will naturally seek to have their systems fully utilized and will therefore avoid establishing transport prices that would result in idle capacity.

Finally, under the Telecom Act, the Commission cannot impose Title II or Title II-like rate regulations on open video systems. Thus, the Commission has no authority to mandate the filing of rate and cost information as a condition to open video system

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16/ Comments of MCI at 4-5, NCTA at 18-20.

certification or the submission of tariffs for open video systems. Instead, the Commission need only codify rules which prevent open video system providers from applying unreasonably discriminatory terms and conditions and rely on the complaint process to review claims of discriminatory treatment in the application of charges.

Some parties suggest that the Commission mandate preferential rates for certain types of programming on open video systems.[17/] The Commission should not require preferential rates for such customers, but should state that open video system operators are presumed not to be violating its antidiscrimination prohibitions if they offer such classes of preferential rates voluntarily.

III. THE ONEROUS ADDITIONAL REGULATORY BURDENS SOUGHT BY THE CABLE INDUSTRY WOULD THWART THE GOALS OF THE TELECOM ACT

A. There Is No Need and No Basis for Separate Subsidiary or Joint Marketing Restrictions

Congress clearly intended to allow providers to operate open video systems without separate subsidiary or joint marketing restrictions. Opponents of video competition disregard this intent in advocating a separate subsidiary requirement.[18/] The Telecom Act is quite precise when establishing various types of separate affiliate requirements, which it

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[17/] See, e.g., Comments of Association of America's Public Television Stations at 2; Alliance for Community Media at 20.

[18/] See, e.g., Comments of NCTA at 27; Time Warner Cable at 10; TCI at 15; and Continental Cablevision at 11.

includes in Title II.[19] Because, as already noted, the conferees did not intend the Commission to impose Title II-type regulation on open video systems, separate subsidiary requirements are not permitted. The Commission, of course, did not propose such requirements in the Notice.[20] With respect to any Bell operating companies ("BOCs") that may choose to be open video system operators, the interLATA transmissions associated with the video programming services they would offer are "incidental interLATA services" under Section 271(g)(1)(A). As such, these transmissions would not be subject to the Telecom Act's separate affiliate requirements.

Moreover, there is no need to bar open video service operators from offering telephone, video, and other services at a single package price, as some argue.[21] Because one-stop shopping is a major convenience to consumers, it is one direction in which communications markets are heading.

B. Cost Allocation Issues Should Not Be Allowed to Delay Implementation of Open Video Systems

The Commission should reject suggestions that cost allocation issues related to the delivery of open video systems and telephone services by LECs be resolved before LECs may offer open video systems.[22] These requests are transparent attempts to forestall

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[19] See, e.g., Telecom Act, Sections 272, 274.

[20] LECs in particular are already subject to comprehensive regulation designed, among other things, to protect ratepayers and competitors.

[21] See Comments of AT&T.

[22] See Comments of NCTA at 22, MCI at 7; Cablevision/CCTA at 31; and Time Warner Cable at 13.

competition. Such arguments were at the center of the video dialtone proceeding, which Congress repudiated by terminating.[23/] To require cost allocation procedures as part of the certification process is not consistent with the streamlined process mandated by the Telecom Act. The delay that is certain from such procedure would serve only to hinder competition in the video marketplace.

IV. CONCLUSION

As discussed in its initial comments, USTA respectfully urges the Commission to grant open video system operators a high degree of flexibility in designing and operating open video systems. Despite the claims of cable interests that seek to handcuff competition from open video system providers, the Commission should adopt highly streamlined regulations governing open video systems, consistent with USTA's proposals.

Respectfully submitted,

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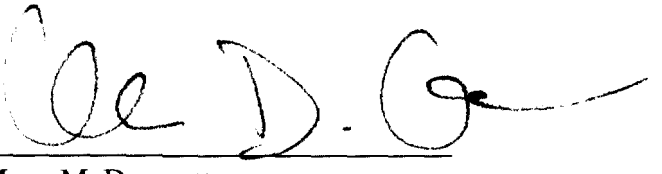
BY: 

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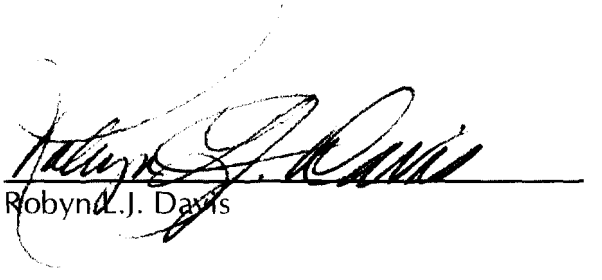
[23/] Similarly, the General Services Administration (GSA) and MCI seek the Commission to recreate the regulatory straitjacket applied to video dialtone through cost allocation proposals. Comments of GSA at 5, MCI at 6-8.

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on April 11, 1996 reply comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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